No. 90-1637

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ANCHOR ESTATES, INC. and WILLIAM R. MILLS, TRUSTEE,

Petitioners,

vs.

THE STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH DAKOTA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the State of North Dakota deny petitioner his constitutional rights of due process and equal protection of the law?

2. Did the State of North Dakota take petitioner's private property for public use without just compensation?

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OPINION BELOW

The North Dakota Supreme Court rendered its opinion in the case of *Anchor Estates, Inc. v. State of North Dakota* on February 21, 1991. (It will be reported in Northwest 2nd, present citation unknown.)

The order denying the petition for rehearing was entered March 20, 1991.

STATEMENT OF JURISDICTION

Judgments against the State of North Dakota Quieting Title on the subject land were entered August 13, 1931, and November 21, 1967. In 1964 the United States began flooding and washing away the land without congressional authorization. In 1989 the State of North Dakota enacted a statute conclusively transferring the land to the State.

Petitioner brought the State into court by the statutorily prescribed method of a court order to show cause why the State should not be held in contempt of court for violating the standard provision in a judgment quieting title which enjoined the State from ever claiming such ownership again.

The trial court dismissed the order to show cause. The Supreme Court affirmed the dismissal.

The decision of the North Dakota Supreme Court sought to be reviewed was entered February 23, 1991, and petition for rehearing denied March 20, 1991.

The statute believed to confer jurisdiction is 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

A. Background

About February 1, 1988, a matter of some importance was

brought to the attention of the United States Supreme Court and ignored (Petition for Certiorari, *Anchor Estates v. United States*, October Term, 1987).

The case was brought in 1981 for the taking by the Army Corps of Engineers of land for which Congress had specifically refused authorization. At that time actions against the sovereign were handled by the United States Court of Claims with review directly by the United States Supreme Court.

Time passes. Things change.

The Court of Claims was eliminated. The Claims Court was inaugurated and across the hall was installed the United States Court of Appeals for the Federal Circuit to monitor decisions against the Attorney General and his client, the Sovereign. Claims court judges need to be re-blessed every fifteen years and the judges for this new appellate court were carefully screened by Attorney General Ed Meese.

The Attorney General persuaded the judge to order counsel for Anchor Estates not to talk to his clients. Mailing a letter might have been contempt, but I had someone else buy the stamp.

In 1984 the Army Corps of Engineers asked Congress for authorization to buy 6,000 acres which was what they wanted besides what they had already stolen. Congress asked for a comprehensive report which was completed June 1985. Anchor Estates demanded its production. The Justice Department ordered its destruction.

The Army Corps of Engineers had mixed emotions. Congress said stand and deliver. The Justice Department ordered destruction. The Army attacked with a smart bomb, and all but two copies were destroyed. These two were delivered to the North

Dakota State Engineer to hopefully satisfy Congressman Dorgan. I stole one.

While repeated motions were made to have the court punish the Justice Department for destruction of evidence, none were allowed to be filed. The ritual process of filing Status Reports was known so a Motion was incorporated there and became filed.

The Justice Department sought a hearing to suppress the Corps' confession. Anchor sought a hearing to find the Justice Department in contempt. Ed Meese came up with a solution to this problem.

Three things happened February 11, 1987:

That day Attorney General Ed Meese decided that even though Congress voted overwhelmingly against the raise, the congressman and justices would get it. That day Trial Judge Yock got $10,000 extra a year.

That day Judge Yock threw out Anchor Estates' claim and held that therefore destruction of evidence was moot. (There is no murder because the victim died.)

That day the United States Senate Environmental and Public Works Committee held a hearing in Bismarck, ND. Mills testified.

The General Accounting Office was asked to investigate. Their report, as well as the destroyed Army Corps of Engineers' report, completely supported Anchor Estates' contentions in the suit.

The General Accounting Office, also observed in their report of March 1988 (Page 3):

A property owner might make a claim against the

> United States for bank erosion on the Missouri River alleging a taking of property under the Fifth Amendment of the U.S. Constitution or the government's negligence under the Federal Tort Claims Act. On the basis of past court rulings, we believe there is little chance of anyone obtaining compensation for bank erosion in either instance.

The petition for certiorari in *Anchor Estates v. United States* (October Term, 1987) should be reconsidered.

A number of years ago, Sheriff Pavelanko went to the federal pen for allowing a mob to torture his Indian prisoner. The United States Justice Department gave me a commendation for prosecuting the only successful civil rights case in the nation that year.

About that time the United States Supreme Court accepted a message from Miranda. The Supreme Court decided that the solution to rotten cops was to let rotten criminals go.

Time passes. Things change.

Because of the Los Angeles video, bad cops are again about to be prosecuted. Because of the recent Supreme Court decision, criminals are about to be denied the brass ring.

Time passes. Things change.

Maybe there is hope yet for a review of our situation.

B. Chronology

In 1931 North Dakota District Judge Fred Jansonius rendered a judgment that settled the boundary between the State Farm and

Anchor Estates' predecessor with a line "To an intersection with the original meander line of the right bank of the Missouri River, looking up stream." (*Erlenmeyer v. State Penitentiary et al.*, Burleigh County District Court, Aug. 13, 1931).

In 1937 the North Dakota Supreme Court ruled that a riparian landowner owned to the ordinary low water mark on the Missouri (*Oberley v. Carpenter,* 274 N.W. 504).

In 1950 the Army Corps of Engineers said they needed the subject land for the Oahe Reservoir.

In May 1953, Congress "reorganized, confirmed, established and vested in *** the persons who were on June 5, 1950, entitled thereto under the law and the respective States in which the land is located ***." (May 22, 1953, c. 65, Title II, Section 3, 67 Stat. 30) (Title 43, Section 1311).

In 1953 Federal Judge Charles Vogel ruled that accretions do not belong to the United States, but to the adjacent landowner [*United States v. 11993.32 Acres,* 116 F. Supp. 671 (Nov. 11, 1953)].

In 1954 U.S. Senator Milton Young got Congress to refuse authorization to take the subject land.

In 1961 the Army Corps of Engineers put in writing that Section Twenty-nine would not be required.

In 1964 the Army Corps of Engineers started flooding the land each winter.

In 1965 the North Dakota Supreme Court held land with fixed boundaries could be re-claimed after submersion because its location could be ascertained (*Perry v. Erling,* 132 N.W. 2d 889).

In 1967 the Corps promised the state officials that Garrison Diversion would be commenced in 1968 if the state officials did not stop the revenues from winter power production accomplished by winter flooding.

Several things were obvious. The Army Corps of Engineers was not about to obey the law. State officials were not about to offend Santa Claus. Things were going to get a lot worse before they ever got better. Perhaps protection by the judiciary would survive.

A boundary agreement was made October 24, 1967, between Anchor Estates and the State of North Dakota:

> for the purpose of *permanently* locating and establishing the lines and corners and *permanently* fixing the boundaries of the land in Section Twenty-nine, Township 138, Range 80, Burleigh County, North Dakota, and to be enabled to *permanently* improve the same.

(Emphasis added.)

The next day an Action to Quiet Title on *all land* in Section Twenty-nine was brought against the State. A judgment was entered November 2, 1967, stating:

> That any and all claims of the defendant (North Dakota) to said real estate or any part thereof are null and void *** that the defendant be forever debarred and injoined from further asserting the same.

Time passed. Things change.

In April 1988, the North Dakota Supreme Court ruled "Whether North Dakota has limited its title to the area below the low watermark has not been decided." (*Furlong v. Sun Exploration*, 423 N.W. 2d 130, 132, note 1).

In November 1988, Charles Carvell wrote an article for the North Dakota Law Review setting aside *Perry v. Erling* and the other cases and adapting note 1 of *Furlong*.

On July 12, 1989, the North Dakota law on Sovereign Land Management became effective. "Sovereign lands means those beds, islands, accretions, and relictions lying within the ordinary high watermark of navigable lakes and streams."

On November 1, 1989, regulations became effective and were innumerable restrictions on use and a requirement to make application for use to be approved by many bureaucrats.

On February 28, 1990, the Russian Legislature enacted laws permitting Russians to have exclusive occupancy of land for home or agriculture in Russia.

REASONS FOR GRANTING THE WRIT

I.

SPECIAL AND IMPORTANT REASONS TO GRANT WRIT

In North Dakota we have a bank robbery. Where do we go to call a cop?

The State won't help. they are getting the loot.

Congress won't help. Their political contributors are getting millions and millions of dollars of government largesse through our injury.

The courts won't help. To support the "popular" position, they distort the facts in the reported opinion so their decision will not appear too weird (*Anchor Estates v. North Dakota,* N.D. Feb. 21, 1991).

Or they disregard the affliction and order the opinion not to be reported (*Anchor Estates v. United States,* No. 87-1290 (U.S. Ct. App., Fed. Cir.)

Or they find the thirty-nine billion dollars of secret money in the black bag of the Army Corps of Engineers' parent organization, the Pentagon, while unappropriated and tax money, while clearly unconstitutional, must continue to be concealed. Only those with "standing" are allowed to peek (*United States v. Richardson,* 418 U.S. 166 (Sup. Ct. June 25, 1974).

To justify the granting of a writ of certiorari there must be "special and important reasons" (Supreme Court Rule 17.1). I am not black or pregnant or even arrested. I will have to go with what I have.

In 1937 the United States started taking part of my earnings for Social Security. I was informed by my government that if I wanted more than Social Security when I retired, I should make investments. It was explained to me that when I retired and liquidated my investments, they would not be taxed like I made all that in one year.

Time passed. Things change.

Today the government is paying unwed mothers to produce and farmers not to. For these grand national goals they have to tax my retirement. *But they don't have to steal it!*

When I returned from the war, I looked around for a suitable

"investment." The United States was moving into flood control and irrigation along the Missouri River. Some investors were buying up bottom land to re-sell to the government. It occurred to me that whatever was left after the government acquired their needs and messed it up would be a good investment. I was right. From the Bismarck-Mandan Memorial Bridge to the Nebraska line (not South Dakota but Nebraska!) is 755 miles. On the Bismarck side of the Missouri there is only five and a half miles of privately owned waterfront in that 755-mile stretch. I wound up with the upper two and a half miles. For forty years we protected the forests and wildlife from fire and destruction. We kept the Missouri from eroding the banks. We have more wild deer and wild turkeys per acre than any government park in the entire United States. And in this private park are many, many homes.

Meanwhile, as expected, the government drowned out all their trees and then lowered the reservoirs. All that land now looks more like a scene from the Moon than Missouri River bottomland.

All over the nation public officials are seeking ways to deliver waterfront land to the public, but "no new taxes." Cunningly, these officials have decided to "nationalize" the shoreline, not condemn it.

Mark Russell got it right. "Steal from the rich and give to the poor. Otherwise the poor will have nothing to steal from each other, and that wouldn't be fair."

II.

THE RIGHTS DENIED

The rights guaranteed by the United States Constitution and violated by the State of North Dakota and by the United States

of America, are as follows:

In the United States Constitution we find in the Fifth Amendment that

> No person shall *** be deprived of *** property, without due process of law; nor shall private property be taken for public use without just compensation.

(Fifth Amendment, United States Constitution.)

Four score and seven years after our Constitution was enacted, some of the States thought some people were more equal than others. To dispel this notion a war was fought. At the cessation of the hostilities a new amendment was added.

> No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any *state* deprive any person of life, liberty or *property*, without due process of law, nor deny to any person within its jurisdiction the *equal protection of the laws*.

(Fourteenth Amendment, United States Constitution, emphasis added.)

The provisions of a state constitution are not generally weighed and considered by the United States Supreme Court. However, the provisions are inexorably woven into the fabric of "privileges" and "immunities" and "due process" and are integral in "equal protection of the laws."

A hundred years ago North Dakota created its Constitution.

> Private property shall not be taken or *damaged* for public use without *just compensation* having been *first made* to, or paid into court for the owner, and *no right of way* shall be appropriated to the use of any corporation, other than municipal, until full compensation therefore be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury unless a jury be waived.

(Article I, Section 16, North Dakota Constitution, emphasis added.)

> Section 18. No bill of attainder, ex post facto law, or *law impairing the obligation of contracts* shall ever be passed.

(Article I, Section 18, North Dakota Constitution, emphasis added.)

Then those citizens, like myself, who believed legislators and judges might get out of line enacted another provision.

> DECLARATION OF RIGHTS. Section 20. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and *shall forever remain inviolate.*

(Article I, Section 21, North Dakota Constitution, emphasis added.)

Neither the Revolution, the Constitution, the Civil War, the Fourteenth Amendment, the Enabling Act, nor the North Dakota Constitution were conceived and dedicated to the proposition that the State was supreme.

The Constitution is not a limitation on citizens. It is a limitation on government.

North Dakota became a State in 1889. Congress passed the Enabling Act and granted North Dakota 500,000 acres of land and provided that North Dakota "shall not be entitled to any further or other grants of land for any purpose." (Act of February 22, 1889, Ch. 180, 25 Stat. 676, Section 17).

Congress enacted laws which granted land to the railroad. The land involved in this case was patented to the railroad January 17, 1896. Petitioner is the successor in interest of the title. The land was on an ancient island many miles long and miles wide.

In 1931 petitioner's predecessor, Erlenmeyer, quieted title against the State to establish where the boundary was in dividing that ancient river bed making the land an island. In 1967 petitioner's predecessor, Anchor Estates, quieted title against the State to establish the south and west boundary. In 1989 the State passed a law that all flooded land and all islands were soverign lands belonging to the State. The State passed regulations that trespassers could not be prohibited on petitioner's land. The court threw out the actions to quiet title of 1931 and 1967 because the riparian concept of "sovereign land" in North Dakota had not been raised in the quiet title actions.

While the ostensible purpose of Garrison Dam was flood control, the hidden agenda was controlled flooding. Rural electric power cooperatives and municipalities were offered cheap power. In order to get on the gravy train, the investor owned utilities

formed their co-op and jumped aboard.

At the present time the Western Area Power Association, alias United States, is buying a million dollars of power *each week* from the power producers and selling it below cost to all these votes.

In 1956 it was obvious that if power was to be produced in the winter time, there would have to be winter flooding somewhere. The area between Garrison Dam and south Bismarck was selected for this honor. There the winter flows are 31,000 cubic feet a second under ice cover. The winter flows downstream leaving the Dakotas is held at 10,000 cubic feet a second. A "right of way" to flush this 31,000 cfs flow downstream was needed in this privately owned segment of the Missouri.

Congress has refused condemnation. The North Dakota Constitution said "*** no right of way shall be appropriated to the use of any corporation *** until full compensation therefore be first made in money ***."

So Article I, Section 16, was amended in 1956 to remove the obligation to pay for the taking of a "right of way." And the State Constitution's provision "to guard against transgressions" that "shall forever remain inviolate" was not longer operable.

The Corps then created "overflowed lands." One of the overflowees met with his Congressman and Senator and complained. The Army Corps of Engineers promised Garrison Diversion out of hydropower profits if they were not stopped from taking overflowed lands where they had no right to flood. So an action against the State of North Dakota to quiet title was started that afternoon. The North Dakota Supreme Court held that the defendant, State of North Dakota, was not bound by

the judgment. Divine right of Kings?

As was stated in *Perry v. Erling,* the area below the *ordinary* high water mark is subject to a federal navigational servitude. (*Perry v. Erling,* 132 N.W. 2d 889, 900 (N.D. 1965).

To provide navigation downstream nearly all the water in Garrison Dam has been released. How do you make power without "head"? You buy it from "friendlies."

Meanwhile, because of the dams there is no "navigation" in the Dakotas, only dams. There is "navigation" in Kansas which provides their farmers the opportunity to send wheat to Portland, Oregon, at greatly reduced rail rates, because of dubious competition from barge rates. Yet on the *entire* Missouri in an *entire* year there is less tonnage than goes through Fargo, North Dakota, by rail every ten days.

In determining whether due process has been present, case law supports the position that the electoral process may satisfy the due process requirement in certain instances. Innumerable decisions require due process from the courts.

In 1950 the Corps of Engineers asked Congress for authority to condemn land for the Oahe Reservoir up to the Bismarck-Mandan Memorial Bridge. In 1954 the riparian landowners, pursuing their right to due process, sought out their Congressmen and Senators who thereupon determined that only the land 11.2 miles or more downstream from the bridge would be taken. Due process was had.

In October 1967, the riparian landowners, pursuing their right to due process, met with Congressman Kleppe and Senator Burdick at a meeting at Mandan and outlined how their land was being flooded and wasted away by the outrageous releases of water from

Garrison Dam by the Corps. The Army Corps of Engineers' representative admited the Corps was flooding land it had no right to flood but stated they were doing so to make money from producing power and would use some of the profits to start Garrison Diversion in North Dakota the following year. To the drought-terrorized farmers in North Dakota, Garrison Diversion was the equivalent of manna from heaven. Congressman Kleppe did not object and he became Secretary of Interior of the United States. Senator Burdick did not object and he became Chairman of the United States Senate Committee on Public Works.

There is a question of whether the guarantee of due process becomes flawed when the guarantor gets a reward from the perpetrator to look the other way.

The new tidelands oil doctrine became current and choice. The "bed" of the stream, and its oil, belonged to the States. The "bed" used to be from *ordinary* low water mark to *ordinary* low water mark (*Perry v. Erling, supra,* at 900).

Time passes. Things change.

The Corps of Engineers built dams and faucets on the Missouri. As a result, according to the General Accounting Office study, the Missouri in North Dakota became a wide, shallow river with many sandbars. The United States admits that each year seventy acres of high, dry land between Garrison Dam and Bismarck is washed away.

The State of North Dakota announced a policy of claiming ownership where the land had been. The State also claims ownership where this eroded dirt deposits at the headwaters of Oahe at Bismarck.

North Dakota has seized all land between the pre-dam

ordinary low water mark, a three foot stage, and the new level that becomes adequately inundated to grow cattails, now a thirteen foot stage.

The North Dakota Supreme Court in its opinion in this case hold that Anchor Estates' 1967 action to quiet title against the State of North Dakota on "all land" in Section Twenty-nine south and west of the boundary is no longer operable. The unanimous decision holds that the issue of "Sovereign Rights" was not considered. The failure of the State to raise the issue is disregarded. Anyone but the "State" who failed to raise an issue, would receive short shrift. But as Justice Levine stated at oral argument, "You can't find the "State" guilty of contempt! How can the "State" be guilty of contempt?" My response that "King George is subject to the law," seemed confusing. I was not referring to Governor "George" Sinner or President "George" Bush. I was referring to the absence of the Divine Right of Kings which we supposedly abandoned in 1776.

III.

THE LAND

The United States bought the subject land in the Louisiana Purchase. A part of that land was transferred to North Dakota. A part of that land was transferred to Northern Pacific Railroad Company.

A. The Land Petitioner Received

Petitioner is the successor in interest to a United States Patent issued January 17, 1896, to the Northern Pacific Railroad Company, covering Lots Five (5) and Six (6) of Section Twenty-nine (29) Township One Hundred Thirty Eight (138) Range Eighty (80) West of the Fifth (5th) Principal Meridian.

In the early 1800's, we accomplished the Louisiana Purchase. About 1849 we had the California gold rush. We had Texas annexed. In any event, we (a broad "we" including our ancestors) found ourselves with vast territory.

To develop America we offered homesteads. To get transportation we made land grants to railroads. We gave bonus of land script to veterans. The name of the game was to develop America, and we did.

A *contract* existed between the United States and the Northern Pacific Railway. The railroad was built and the United States granted them the agreed patents. The rule on surveys was that the riparian lot extended to "the water course ***." (2 Stat. at L. 313, Chap. 14, Rev. Stat. P. 2396, 43 U.S.C.A. § 752). The present petitioner is a successor in interest to that contract.

B. The Land the State Received

The State of North Dakota exchanged its opportunity to obtain "swamp and overflowed lands" from the United States by accepting high dry land, "in all five hundred thousand acres." [Section 17 of the Enabling Act of February 22, 1889, Ch. 180, 25 Stat. at L. 676)].

An examination of chronological statutes is needed.

On September 4, 1841, Congress passed "An Act to appropriate the proceeds of the sales of public lands, and to grant pre-emption rights." Eight States, not North Dakota, were paid 10 per cent of land sales and each State given five-hundred thousand acres of land for purposes of internal improvement (Section 8).

On September 28, 1850, Congress passed "An Act to enable

the State of Arkansas and other States to reclaim the 'swamp lands' within their limits."

> *** the whole of those swamp and overflown lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State.

The Act also set out:

> Sec. 4. *And it be further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated. APPROVED, September 28, 1850.

On February 22, 1889, Congress passed "The Enabling Act" permitting North Dakota to become a State. Section 17 reads in part as follows:

> SEC. 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, (sic, North Dakota) and in lieu of any claim or demand by the said States, or either of them, under the act of September twenty-eight, eighteen hundred and fifty and section twenty four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, *which grant it is hereby declared is not extended to the States provided for in this act* and in lieu of any grant of saline lands to said

> States, the following grants of land are hereby made, to wit:
>
> *** To the State of North Dakota a like quantity of land as is in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.
>
> *** That the States provided for in this act *shall not be entitled to any further or other grants of land for any purpose* than as expressly provided in this act.

(Act of February 22, 1889, Ch. 180, 25 Stat. at L. 676, emphasis added.)

IV.

EROSION AND FLOODING

Each year seventy acres of high bank ground is washed into the river between Garrison Dam and Bismarck. The State claims the title to the place it had been.

This dirt flows south and when the river flow diminishes at the headwaters of Oahe, this dirt settles out on the bottom forming sandbars. The State claims title to the place it landed.

> Consequently, the high valley lands are giving way to a continually widening belt of low sandbars and river channels.
>
> *Waterlogging* occurs when the groundwater table rises to a point where the usefulness of land, whether for farming or human occupancy is

> impaired. Three areas with this type of problem have been identified. These are the Buford-Trenton area in the headwaters area of Lake Sakakawea, *the Bismarck area in the headwaters of Lake Oahe*, and the general area below Fort Randall as far downstream as Niobrara, Nebraska. All of the problems in these areas can be traced to changes in hydrologic characteristics of the river *resulting from operation of the main stem system.*

(Corps Report of May 28, 1976, pp. 3, 4, emphasis added.)

In 1967 it became apparent that the Corps releases were going to wash away land unless something was done. Expensive improvements required financing and good title. Anchor Estates and North Dakota executed an agreement.

> NOW THEREFORE, for the purpose of *permanently locating and establishing the lines and corners and permanently fixing the boundaries of the land in Section Twenty-nine,* Township 138, Range 80, Burleigh County North Dakota, and to be enabled to permanently improve the same, we do hereby enter into this agreement, each of us binding ourselves, our heirs, executors and administrators and assigns to the conditions hereof, and agree as follows.

(Emphasis added.)

On October 24, 1967, the Members of the Board of Administration inspected the subject land and the Boundary Agreement was executed.

On October 24, 1967, the same day that William R. Mills

appeared before the Board of Administration, he also appeared at a meeting in the REA-RTA building at Mandan, North Dakota. That meeting was with Senator Quentin N. Burdick; Congressman Thomas S. Kleppe; Mylo W. Hoisveen, Chief Engineer, North Dakota Water Commission; Colonel R. W. Love and J.O. Ackerman of the Army Corps of Engineers.

The North Dakota State Water Commission, Office Memo dated October 27, 1967, correctly reports what Mr. Mills said.

> *William R. Mills:*
>
> We have some land south of Bismarck and we attempted to do our own revetment works. Unfortunately we have not had too much success due to the erratic flows of the Missouri River.
>
> What I can't understand is why these erratic flows are only occurring between Garrison Dam and the tailwaters (sic headwaters) of the Oahe Reservoir. According to the Corps of Engineers, maximum safe releases downstream from us is only 15,000 cfs and the Missouri River channel downstream has a greater capacity for carrying flows. Below Fort Peck Dam, the river channel is quite narrow and maximum safe releases from Fort Peck according to Corps of Engineers is 13,500 cfs. During construction of the Interstate-94 bridge across the Missouri River, maximum releases from Garrison Dam were held at 20,000 cfs, and increased to 31,000 cfs to scour out material in the channel above and below the new Interstate-94 bridge. This was reported by the Corps of Engineers, so I am sure they are aware of the effects of flows in the vicinity of 31,000 cfs.

The erosion and flooding was being castigated. Colonel R.W. Love of the Army Corps of Engineers stated in part:

> The high releases made from Garrison Dam are also necessitated to meet power demands. The monies received for the production of this power is used to finance such projects as Garrison diversion which is planned to commence construction in 1968.

(North Dakota Water Commission Office Memo 27, October 1967, at 6.)

The next day, October 25, 1967, Anchor Estates, Inc. brought an Action to Quiet Title. On October 28, 1967, the State made its answer. On November 2, 1967, Judge Lynch executed Findings of Fact, Conclusions of Law, and Order for Judgment. Judgment was issued and recorded that day. What was the purpose of the Action to Quiet Title brought October 25, 1967?

> QUIET, v. To pacify, to render secure or unassailable by the removal of disquieting causes or disputes. This is the meaning of the word in the phrase "action to quiet title," which is a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it. *Wright v. Mattison,* 18 How. 56, 15 L. Ed. 280.

(Black's Law Dictionary, 4th Edition.)

The erosion caused by the winter flooding is illegal. Congress refused authorization to take the land.

For twenty-two years the State has failed to stop the *illegal* flooding and erosion. When the Army Corps of Engineers asked for all the land to the Memorial Bridge, Congress refused and moved the taking line 11.2 miles downstream.

The State now claims it owns all those areas eroded away. It now claims it owns all those areas flooded each winter with 31,000 cfs and the artificial 13.4 stage. And just in case they missed something, it claims all islands regardless of elevation.

The State has decided "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." [*Kaiser Aetna v. United States*, 100 S. Ct. 383, 391 (1979)].

V.

THE CONTEMPT

The 1989 session passed "S.L. 1989, Ch. 552, Sec. 3" which reads in part:

> "Sovereign lands" means those beds, islands, accretions, and relictions lying within the *ordinary high watermark* of navigable lakes and streams.

(61-33-01(3), emphasis added.)

Transfer to the State is "conclusively presumed."

> All possessory interests now owned or that may be acquired *** in the sovereign lands of the state owned or controlled by the state or any of its officers, departments, or the Bank of North Dakota, together with any future increments, are

> transferred to the state of North Dakota, acting by and through the state engineer. *** These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish *the fact of transfer of title* to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient *delivery of all title documents is conclusively presumed.*

(61-33-03 NDCC, emphasis added.)

There are three types of land involved in this proceeding.

First, that land between the *ordinary* high water mark and the pre-dam ordinary low water mark.

Second, that land between the pre-dam ordinary high water mark, a 5.56 river stage, and the so-called permit line which was created by the water trapped each winter by the massive releases under ice cover, a 13-foot river stage.

Third, that land that is on an island in the Missouri.

Presumably this section represents the accrual of a title. Since 1877 the law has generally been and definitely is yet:

> The State of North Dakota will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the state to same, unless:
>
> 1. Such right or title shall have accrued within forty years before any action or other proceeding

for the same shall be commenced ***.

(28-01-01 NDCC).

So that it would be clear that the property involved in "the fact of transfer of title" included all land below a line where water had prevented the growth of vegetation, provisions were inserted in the "North Dakota Administrative Code."

> "Navigable streams of water" means any waters which were in fact navigable at the time of statehood, including the Missouri River in its entirety ***
>
> "Permit line" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. *Islands in navigable streams and waters are considered to be below the permit line in their entirety.*

[89-10-01-03-(3)(4), emphasis added.]

The Administrative Code also announced that the public and their offroad vehicles could not be prohibited from occupying the property, except as provided by the Administrative Code (89-10-01-12 and 89-10-01-13 NDAC).

VI.

THE GRAVEL

The Bismarck area is out of gravel that will pass specification for concrete. Northern Improvement Company has been hauling good gravel in many miles to mix with the local crud so they could

get it to pass inspection. Fifteen thousand years ago the Wisconsin Glacier came down to the present site of the Missouri and left glacial debris, part of which was gravel.

Prior to the Wisconsin Glacier, a river ran from Wyoming and made a turn south just east of the Anchor Estate property. During this period, in the bend in that ancient river, there was deposited excellent gravel as well as titanium and precious metals. Since 1955 assays have been made, recovery procedures designed, test holes dug and corings taken by petitioner. In 1987 a lake was begun on the property in which to place a hydraulic dredge. Special methods were designed and special equipment arranged for. The activity was closely monitored by Northern Improvement Company and Fisher Sand and Gravel. Anchor Estates' expert died during the Thanksgiving holidays in 1987. The lake was completed in 1988. Then in January of 1989 came the North Dakota Legislature.

Anchor Estates' expert calculated quality, quantity and market and concluded that the sand and gravel alone are saleable at $116,640,000 and the cost of extraction and sale are 9.89%.

The Administrative Rules provide that this island, surrounded by a navigable stream at statehood, and now partially inundated by the releases from Garrison Dam each winter, must comply with Rule 89-10-01-09 NDAC in "mining of gravel, sand, or other resources other than oil, gas and related hydrocarbons."

> Mining must be completed in the shortest practicable period of time and during the season which will minimize the effects on the waterway and biotic life in the waterway.

(89-10-01-09 (1) (a) NDAC).

The concept of mining and stockpiling gravel "in the shortest practicable period" would require an expenditure of $11,535,696, less that part of the 9.89% reserved for sales. Annual debt service on eleven million dollars would be a million dollars a year. Meanwhile, back at the pit, gravel and gold keep well, no spoilage, and it's perfectly happy in the ground.

VII.

THE TAKING

In this Republic, the federal government is an entity with "delegated" powers. All other powers are in the State or reserved to the people. The United States can take land when legislation is passed by Congress authorizing a taking. Not otherwise.

On the other hand, States can delegate authority to take private property for public use. The caveat is, the property must be paid for. Up to now.

Until a couple of years ago, big brother could go on a search and destroy mission and the docile judges would label it "incidental damage." In the past couple of years the United States Supreme Court decided there can be a permanent taking in a temporary affliction.

We do not quarrel with the concept that anyone can be empowered with state condemnation rights. We don't like it, but legally it floats.

The United States Supereme Court has ruled recently on whether regulations are condemnation. A harbor in Hawaii could be open to trespass right after the government paid for it (*Kaiser Aetna v. United States,* 100 S. Ct. 3832).

The beach front of a California resident could not be extorted via a building permit regulation (*Nollan v. California Coastal Commission,* 107 S. Ct. 3141).

Denying a re-building permit (regulations) was a taking (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S. Ct. 2378).

North Dakota made laws providing a judicial method of quieting title. This method has been utilized. The State was made a party. The title was quieted.

The question is not how such an action would come out today. It is not whether we would "win" or "lose" but whether we have to play the game.

VIII.

THE OPINION

The opinion *does not* reflect that all of Anchor's land is on an island. It pretends it is all "riverbed."

The opinion erroneously states the action was brought because the state was "regulating activities below the ordinary high water mark *** because that judgment gave Anchor title to the *riverbed* ***". (Emphasis added.)

Is an island that has been in continuous existence since before statehood and forested with ancient trees mere "riverbed"?

The procedural rules requiring contempt procedures to adjudicate a violation of an injunction against claiming land on which the title has been quieted does not change the court's obligation to enforce the judgment and the injunction. It does

not require affirmance if the trial court did not behave like a striped ape. In this case the trial judge behaved like a gentlemen and a judge, which he is. He was in error and should have been reversed.

CONCLUSION

The petition for a writ of certiorari in *Anchor Estates Inc. v. United States* (October Term, 1987) should be reconsidered.

One attorney in a litigation changes the court and approves the judges. Then that attorney helps create a "safe" appellate court and selects its judges. Then that attorney overrules Congress and gets all the judges a pay raise. Meanwhile, back at the raunch, he conceals and destroys evidence and nothing is done about it.

In reporting facts involved in *Anchor Estates v. United States* we do not mean to be beating a dead horse. But the absence of due process and equal protection of the law is a cumulative condition.

When does the absence of due process and equal protection reach that capacity requiring judicial review by the United States Supreme Court?

We respectfully submit that the scales of justice have been adequately tipped.

Respectfully submitted,

WILLIAM R. MILLS
Petitioner, Pro Se

APPENDIX A — ORDER DENYING PETITION FOR REHEARING ENTERED MARCH 20, 1991

STATE OF NORTH DAKOTA

SUPREME COURT

March 20, 1991

Mr. William R. Mills
2904 Langer Lane
Bismarck, ND 58504

RE: Anchor Estates, Inc. v. State of North Dakota
Supreme Court No. 900289

The Supreme Court has entered an order denying the petition for rehearing in this case.

In accordance with Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of the District Court after the expiration of seven days.

Sincerely yours,

s/ Luella Dunn
Luella Dunn
Clerk
North Dakota Supreme Court

LD:pm

cc: Mr. Charles M. Carvell, Asst. Attorney General
The Honorable William F. Hodny

APPENDIX B — OPINION OF THE NORTH DAKOTA SUPREME COURT FILED FEBRUARY 21, 1991

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Anchor Estates, Inc., Plaintiff and Appellant

v.

State of North Dakota, Defendant and Appellee

Civil No. 900289

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable William F. Hodny, Judge.

AFFIRMED.

Opinion of the Court by Gierke, Justice.

William R. Mills, 2904 Langer Lane, Bismarck, ND 58504. Pro se.

Charles M. Carvell (argued), Assistant Attorney General, Attorney General's Office, 900 East Boulevard Avenue, Bismarck, ND 58505, for defendant and appellee.

Appendix B

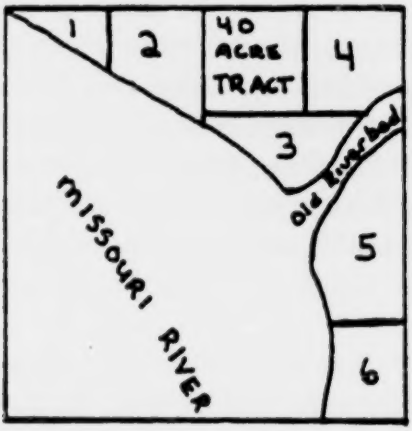
Anchor Estates, Inc. v. State

Civil No. 900289

GIERKE, Justice.

Anchor Estates, Inc. appeals from a district court judgment dismissing a contempt action against the State of North Dakota. We affirm.

Anchor's contempt action involves disputed ownership of the riverbed of the Missouri River in Section 29, Township 138 North, Range 80 West in Burleigh County. The plat of the original survey of Section 29 in 1872 included six lots plus a 40-acre tract of land:



Appendix B

The State owned the land to the north and west of the old riverbed; i.e., lots 1, 2, 3, 4 and the 40-acre tract. Anchor owned the land to the east and south of the old riverbed; i.e., lots 5 and 6.

After the original survey, land began to accrete to Lots 1 through 6 as the Missouri River moved to the southwest. In October 1967, the State, through the State Board of Administration, and Anchor entered into an agreement to establish the boundary between their lands as:

> "An imaginary line beginning at a point on the East line of Section Twenty-nine, Township 138 North, Range 80 West, in Burleigh County, North Dakota, a distance of 1254 feet South of the Northeast Corner of said Section, thence South 62½° W. 570 feet, thence South 40° W. 640 feet, thence South 37½° W. 765 feet to an intersection with the original meander line of the right bank of the Missouri River, looking up stream, as shown by the original field notes on file in the General Land Office at Washington, D.C. and thence from said point directly southwest to the south section line of Section Twenty-nine, Township 138 North, Range 80 West, in Burleigh County, North Dakota."

The parties agreed that the State owned the land north and west of the boundary in lots 1, 2, 3, 4, and the 40-acre tract, and that Anchor owned the land south and east of the boundary in lots 5 and 6.

Anchor then commenced a "friendly" quiet title action against the State. Judgment was entered on November 2, 1967,

in which the court determined that Anchor owned lots 5 and 6 which consisted of all land in Section 29 lying south or east of the boundary and that the State owned the 40-acre tract and lots 1, 2, 3, and 4 which consisted of all land in Section 29 lying north or west of the boundary. The judgment enjoined each party from asserting claims to the other's property.

In 1989 the Legislature transferred primary jurisdiction over the beds of navigable rivers, including the Missouri River, from the Board of University and School Lands to the State Engineer and defined sovereign lands as "beds, islands, accretions, and relictions lying within the ordinary high watermark of navigable lakes and streams." 1989 N.D.Sess. Laws ch. 552, § 3. The State Engineer adopted administrative rules regulating activities below the ordinary high water mark of navigable lakes and rivers. N.D. Admin. Code ch. 89-10-01.

Anchor then brought this contempt proceeding, alleging that the legislation and administrative rules regulating activities below the ordinary high water mark of navigable rivers violated the 1967 quiet title judgment because that judgment gave Anchor title to the riverbed in lots 5 and 6 of Section 29. The State contended that the 1967 quiet title judgment did not determine title to the riverbed.

The district court determined that the 1967 judgment was unclear about ownership of the riverbed in Section 29 and therefore the State was not in contempt of that judgment. The court dismissed the contempt proceeding.

On appeal Anchor contends that the 1967 judgment permanently established title to all the land in Section 29, including the riverbed. Anchor claims that the State's sovereign land statutes

and rules, which regulate activities below the high water mark of navigable rivers, interferes with Anchor's title and constitutes contempt of the 1967 judgment.

The State responds that the 1967 litigation only defined the boundary between the accreted land in Section 29 and that the judgment did not decide ownership of the riverbed. It argues that because of the uncertainty of title of the riverbed, the trial court did not abuse its discretion in failing to find the State in contempt of the 1967 judgment. We agree.

A complainant in a civil contempt proceeding must clearly and satisfactorily show that the alleged contempt has been committed. *Buchmann v. Buchmann,* 202 N.W.2d 677 (N.D. 1972). Civil contempt requires a willful and inexcusable intent to violate a court order. *Bergstrom v. Bergstrom,* 320 N.W.2d 119 (N.D. 1982). A determination of whether or not a contempt has been committed is within the sound discretion of the trial court, and its determination will not be disturbed on appeal absent an abuse of discretion. *Fargo Women's Health Organization v. Larson,* 391 N.W.2d 627 (N.D. 1986); *Bergstrom v. Bergstrom,* 320 N.W.2d 119 (N.D. 1982). An abuse of discretion occurs when a trial court acts in an arbitrary, unconscionable, or unreasonable manner. *Fargo Women's Health Organization v. Larson, supra.*

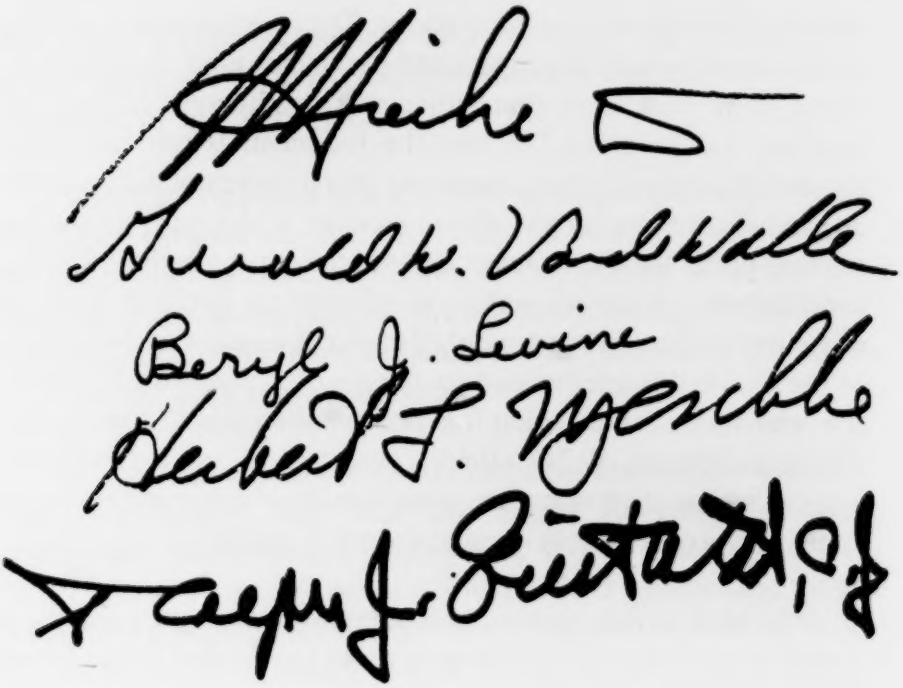
In this case, the parties' 1967 agreement defined the boundary between the accreted land in lots 1 through 4 and lots 5 and 6 without reference to the riverbed or sovereign land. The quiet title judgment refers to the accreted land and adopts the same boundary line as in the boundary agreement. Although the pleadings and judgment refer to "all land" in Section 29, the context of the use of that phrase describes ownership of the land in the particular lots on one side or the other of the agreed

boundary line dividing the accretions. The riverbed and sovereign lands are not specifically mentioned in the pleadings or judgment. There is no indication that either party contemplated that the riverbed was involved. At best the judgment is unclear about ownership of the riverbed. Assuming that a contempt action could lie against the State for the alleged conduct in this case, we cannot say that under these circumstances the trial court acted arbitrarily, capriciously, or unreasonably in refusing to find the State in contempt of the 1967 judgment. Because the extent of ownership of the riverbed is unclear and some type of "ownership" interest is a prerequisite for an action for condemnation [*see* 27 Am.Jur.2d, Eminent Domain, § 247 (1966)], we also do not believe that, without a clear determination of ownership, Anchor may use this contempt proceeding as a condemnation action.

Nothing in this opinion precludes Anchor from asserting a condemnation claim if it chooses to do so [*see Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)], and we express no opinion on Anchor's argument that before the 1989 legislation, the State owned land below the low watermark of a navigable stream. *Compare Perry v. Erling,* 132 N.W.2d 889 (N.D. 1965) (Teigen, J., concurring) *with J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.,* 423 N.W.2d 130, 132 at n. 1 (N.D. 1988) and Carvell, North Dakota Waterways: The Public's Right of Recreation and Questions of Title, 64 N.D.L.Rev. 7 (1988).

The district court judgment is affirmed.

Appendix B



APPENDIX C — JUDGMENT OF THE STATE OF NORTH DAKOTA, DISTRICT COURT OF BURLEIGH COUNTY, SOUTH CENTRAL JUDICIAL DISTRICT FILED MAY 25, 1990

STATE OF NORTH DAKOTA
DISTRICT COURT OF BURLEIGH COUNTY
SOUTH CENTRAL JUDICIAL DISTRICT

Civil No. 19923

ANCHOR ESTATES, INC.

Plaintiff,

v.

STATE OF NORTH DAKOTA,

Defendant.

JUDGMENT

The Honorable William F. Hodny ordered the defendant, State of North Dakota, to appear at the Burleigh County Courthouse at Bismarck, North Dakota, on April 9, 1990, 9:30 a.m., and show cause why it should not be adjudged guilty of contempt and punished accordingly. Judge Hodny ordered that the contempt proceedings initiated be dismissed.

IT IS ORDERED AND ADJUDGED THAT:

The contempt proceedings initiated by the issuance of the Order to Show Cause on the 15th of March, 1990, are hereby dismissed without cost to either party.

Appendix C

Dated this 25th day of May, 1990.

s/ Marian Barbie
Clerk of Court
By: Debra Huntley, deputy